(21)

No. 97-1235

In The

Supreme Court of the United States

October Term, 1997

CITY OF MONTEREY,

Petitioner,

v.

DEL MONTE DUNES AT MONTEREY, LTD. AND MONTEREY-DEL MONTE DUNES CORPORATION,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR THE PETITIONER

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I. INTRODUCTION

Respondents portray the City as presenting extreme and novel legal positions designed to insulate the City against liability for its supposedly outrageous abuses of power. For this purpose, Respondents distort the factual record concerning the City's land use decision and advocate new legal standards that would fundamentally change the role of the Constitution in the local land use process. Respondents advocate assigning to juries, rather than courts, the task of applying the perplexing standards governing regulatory takings. They seek to replace the historically deferential standard of constitutional review with a *de novo* reevaluation of the same evidence considered by the governmental decisionmaker. Finally, Respondents seek to impose takings liability for all governmental actions that a jury concludes did not achieve an appropriate equipoise between public and private interests.

While any one of these formulas alone would undermine the authority of local governments responsible for land use planning, cumulatively they promise to "throw one of the most difficult and litigated areas of the law into confusion, subjecting States and municipalities to the potential of new and unforeseen claims in vast amounts." *Eastern Enterprises v. Apfel*, 118 S.Ct. 2131, 2155 (1998) (Kennedy, J., concurring in part and dissenting in part). Respondents assert that this result is perfectly acceptable because, through the proposed standards, juries can inject "common sense into the balancing process." Resp. Br. at 14 n.13. The problem with Respondents' assertion is that juries are not city councils and they should not intrude on local governments' inherently political power to make and implement land use policies.

All this is *not* to say that local land use decisions and regulations are immune from constitutional review. Constitutional review is always available to ensure that there is some legitimate basis for the government's decision. This review is accomplished by applying to local land use decisions the same type of deferential review that courts apply to governmental decisions in other legislative, quasi-legislative and

quasi-adjudicative contexts.[1] Deference to the legitimate purpose of a land use decision does not make the Fifth Amendment a dead letter. There remains the Fifth Amendment requirement that just compensation be paid when a legitimate government action goes too far and deprives property of all economically viable use.

The ultimate issue posed by all three questions upon which *certiorari* was granted is how constitutional limitations on local land use decisions should be applied. Respondents would have a jury compare the benefits and burdens of a project, and impose liability if it concludes, as a matter of fact and policy, that project benefits outweigh project burdens, giving no deference to the local government's decision. Resp. Br. at 44. This approach is wrong. It would be tantamount to transforming the Constitution into a federal land use plan with juries acting as land use planners.

II. RESPONDENTS MISCHARACTERIZE THE RECORD, THE CITY'S REGULATORY ACTION AND THE JURY'S VERDICT.

In their brief, Respondents essentially ignore the factual context of the City's decision to reject their development proposal. Respondents do not deny that inadequacies in their proposed habitat restoration plan were the primary ground for the City's decision and they make no mention of the fact that their restoration plan was seriously criticized by the United States Fish & Wildlife Service ("USFWS"), the California Department of Fish & Game ("Cal DFG") and others. Although they condemn the City's decision as an outrageous abuse of power, Respondents make no attempt to explain how

[1] The City supports the substantial arguments made by the United States and certain other amici that a finding that a regulation fails to advance a legitimate state interest cannot be a basis for imposing liability for "just compensation" under the Takings Clause. These arguments appear to be consistent with views recently expressed by members of this Court in *Eastern Enterprises*, 118 S.Ct. 2131, 2157-60, 2162-64 (1998) (Kennedy, J., concurring in part and dissenting in part; Breyer, J. dissenting).

their proposed plan was sufficient or why improvements to that plan were not feasible.

Proper review of the Ninth Circuit's decision in this case requires an accurate understanding of exactly what the City did and did not decide in rejecting the proposed 190-unit condominium development, and what the jury did and did not decide when it imposed takings liability.

Contrary to Respondents' fervid protests, the City's rejection of the 190-unit condominium proposal did not constitute a declaration that the subject property was to be preserved as open space or that all development on the subject property was precluded. Certainly, the trial court made no such finding. On the contrary, the trial court expressly concluded that the City did *not* intend to forestall all development on the subject property.[2] Pet. App. 41-42. Nor can it be said that the jury found that the City intended to preserve the property as open space. The jury imposed takings liability, but there is no indication of the basis for its verdict. There is no way of knowing whether the jury concluded that the City's action failed to advance a legitimate purpose or determined that the project denial deprived the property of all economically viable use. For this reason, Respondents are simply wrong insofar as they assert that it can be inferred from the jury's general verdict that that City's denial of the proposed 190-unit development constituted a denial of all use of the subject property.[3] Indeed, it was because the verdict form

[2] Respondents argue that, because the district court denied the City's post-trial motions for entry of judgment as a matter of law and for a new trial, "[t]he City got the same result from the judge as it did from the jury." Resp. Br. at 7. This argument ignores the distinction between making initial factual findings and reviewing a verdict under Federal Rule of Civil Procedure 50 to determine whether there is "no legally sufficient basis for a reasonable jury" to support a verdict. In refusing to grant judgment as a matter of law, the trial court did not conclude that a taking had occurred.

[3] The jury was instructed that, in order to find denial of all economically viable use of the property, "there must be a showing that after the action of the City that is being challenged here, the property is left with

made it impossible to know which of the two theories of takings liability the jury had accepted that the Ninth Circuit correctly recognized that it could affirm only if the jury's decision was legally sustainable with respect to *each* theory of liability. Pet. App. 10.

Respondents further mischaracterize the City's actions by asserting that, in rejecting Respondents' proposal, the City "announced that the only place that it had earmarked for the homes was also the only place to create a butterfly preserve for the [Smith's Blue Butterfly]." Resp. Br. at 5. The reality was quite different. Before Respondents even acquired the subject property, their predecessor and the City recognized that concerns over shoreline erosion and the requirements of the California Coastal Act would preclude development on the beach area, leaving the central portion of the property as the only area large enough for a proposed residential development. Jt. App. 57, 193-199; Tr. Exh. 24. Contrary to Respondents' rhetoric, the City did not "announce" an intent to create a "butterfly preserve" in this central portion of the property in lieu of the proposed development. To the contrary, when the City conditionally approved the 190-unit site plan in September of 1984, it acknowledged and accepted that much of the native habitat would be destroyed. Jt. App. 185-86, 251-52; R.T. 829. The City simply required that Respondents mitigate this harm by means of an appropriate restoration plan, which both Respondents and their predecessors knew would be required.[4] Jt. App. 273-80.

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no significant value." Jt. App. 304. Given that plaintiffs' own experts conceded that the property retained millions of dollars in value and was ultimately sold for $4.5 million after the City's action (RT 602-604, 518-19), it seems unlikely that the jury would have concluded that the property had "no significant value" and imposed takings liability on a "denial of all use" theory.

[4] Respondents suggest that further efforts to modify their project would have been pointless because "the City" rejected five different development plans, even though these proposals were well below the applicable zoning limits, which permitted up to 1000 units on the property.

Respondents also suggest that this is not really a regulatory denial case because the development proposal presented to the City contemplated substantial dedication of property. Resp. Br. at 4-5. What Respondents fail to mention is that the property dedication included as part of Respondents' development proposal had nothing to do with the City's decision to deny this project.[5] The vast majority of the dedication contemplated by Respondents' proposal consisted of the beachfront area on the seaward side of the development line. Jt. App. 57. This proposed dedication was never the subject of any objection by Respondent and was completely unrelated to the City's decision in June of 1986 to deny this development due to access and habitat concerns.[6]

Respondents also repeatedly try to characterize the City's actions as having effected a total taking of their property. This

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[3] Resp. Br. at 3-4 & n.3. These statements are misleading. When Respondents purchased the property in 1984, the local coastal plan regulating the property permitted a maximum density of seven units per acre for a maximum aggregate density of approximately 250 units. Tr. Exh. 28 at 15. Moreover, the City Council, which is the ultimate decisionmaker, considered only three proposed development plans. As the district court concluded in rejecting Respondents' substantive due process claim, these prior decisions by the City Council provide no basis upon which to infer an intent to preclude all development. Pet. App. 41-42.

[5] The contemplated dedications were included in Respondents' development proposal because both Respondents and the City recognized that it was required by the California Coastal Act and would be demanded by the California Coastal Commission, which had ultimate decisionmaking authority over the property. Jt. App. 193-98.

[6] Significantly, when Respondents purchased the subject property, the conditionally approved site plan proposal that they "acquired" with the property included all of the dedications about which they now complain. At no time thereafter did the City demand additional dedication of property. The price Respondents paid, and hence their "reasonable investment-backed expectations" regarding property, were necessarily based on the property as subject to all of these proposed dedications.

is not a "total taking" case. Respondents purchased the property for $3.7 million in 1984. R.T. 511. Then, despite the City's rejection of the proposed 190-unit development, the property increased in value and was sold for $4.5 million less than five years later.[7] R.T. 518-19. These undisputed facts do not equate to a total taking.

III. RESPONDENTS' ANALYSIS OF WHETHER A RIGHT TO JURY TRIAL EXISTS FOR INVERSE CONDEMNATION PROCEEDINGS AVOIDS THE RELEVANT INQUIRIES.

A. Respondents' Attempt to Read a Right to Jury Trial Into the General Character of § 1983 Is Improper.

Respondents concede that the legislative history and plain meaning of 42 U.S.C. § 1983 evidences no express congressional intent to confer a statutory right to jury trial. In the absence of any express statement of intent, Respondents claim to have found congressional intent implied by the language in § 1983 creating liability for "an action at law."[8]

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[7] Respondents complain that they were forced to sell the property to the State of California based upon a non-negotiable take-it-or-leave-it offer for less than half of its fair market value. Resp Br. at 6. In fact, the State's offer was based upon an appraisal that ascribed a fair market value of $4,500,000 to the property based on a highest and best use of condominium development of up to 150 units. R.T. 532-33, 535-37.

[8] Respondents argue that the onus is on the City to prove not only the absence of a right to jury trial, but the existence of a right *not to have a jury trial*. Resp. Br. at 10-11. This argument is seriously amiss. When a court is the proper decisionmaker, parties have a right to have the court make express findings of fact pursuant to Federal Rule of Civil Procedure 52. When a jury is erroneously permitted to resolve questions properly for the court, and the court considers itself bound to follow the jury verdict even though contrary to its own appraisal of the evidence, the result is *error*. *See* II Charles A. Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2887, at 476 (1995); *see also* Pet. App. 10. In fact, Respondents and the cases to which they cite, acknowledge that an

If § 1983 was adopted to address only a single category of wrong and if the statutory reference to "an action at law" was the only statutory remedy, Respondents' argument might have some force. However, Respondents' argument ignores the fact that "an action at law" is only one of the possible types of claims that can be brought under § 1983.[9] Section 1983 also encompasses "suits in equity" and all other "proper proceedings for redress." This reference to multiple types of actions is consistent with Congress's primary purpose in promulgating § 1983, which was to create a federal remedy for persons deprived of all types of constitutional rights. *See Haines v. Fisher*, 82 F.3d 1503, 1508 (10th Cir. 1996). Section 1983 is an empty vessel that provides a vehicle for vindicating rights elsewhere created. *Albright v. Oliver*, 510 U.S. 266 (1984); *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 618 (1979). The determination of whether inverse condemnation claims are for a jury turns on the substantive nature of the claim itself, an inquiry that must be determined in accordance with the requirements of the Seventh Amendment.

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erroneous trial by jury can only be treated as harmless "if [the court is] satisfied that the proper result was reached." Resp. Br. at 12 (quoting *Great American Ins. Co. v. Johnson*, 27 F.2d 71 (4th Cir. 1928)). In this case, the district court would almost certainly have reached a different result if it did not feel bound by the jury's verdict. Based on the same evidence relied on by the jury, the district court expressly concluded that the City had a legitimate basis for its decision and did not intend to "foreclose all reasonable development." Pet. App. 41-42.

[9] Contrary to the suggestion in footnote 17 of Respondents' Brief, none of the cases cited therein concludes that § 1983 creates a statutory right to jury trial. To the extent that they address the issue at all, the cases cited by Respondents merely demonstrate what the City already concedes, that there is a right to jury trial if the nature of the claim asserted under § 1983 is analogous to one traditionally subject to jury trial at common law. *See, e.g., Dolence v. Flynn*, 628 F.2d 1280, 1282 (10th Cir. 1981) (finding right to jury trial in § 1983 action brought by prisoner who was allegedly kicked and pushed down stairs because the "case at bar is clearly a garden variety tort action based on common law of assault and battery").

Respondents' argument that there exists a statutory right to jury trial also imputes a Congressional intent to interfere with state courts' procedures in inverse condemnation claims under § 1983. Regulatory takings claims must ordinarily be pursued initially in state courts. *See Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186 (1985). As documented in the amicus brief of the State Attorneys General, the overwhelming majority of state courts provide no right to jury determination of liability issues in state inverse condemnation proceedings. Nevertheless, a congressionally conferred right to jury trial under § 1983 would require that state courts provide jury trials for inverse condemnation claims brought under § 1983.[10] This conflict would significantly confuse and complicate the litigation of regulatory takings claims.

B. Respondents Offer No Meaningful Basis for Finding a Seventh Amendment Right to Jury Trial in Inverse Condemnation Actions.

1. Respondents Provide No Basis to Ignore the Close Analogy to Direct Condemnation Actions, Which Do Not Implicate the Seventh Amendment.

The preeminent question that determines whether a particular claim or issue carries with it a right to jury trial under the Seventh Amendment is whether that claim or issue was triable by a jury at common law or is analogous to one that was. *See Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 378 (1996); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989). The most obvious analogy to inverse condemnation actions is direct condemnation actions. Both actions arise out of the Takings Clause. Both actions are predicated on a government's taking of property for a public purpose.

[10] For example, if a state inverse condemnation action and a federal takings action were litigated seriatim in state court, a claimant in state court could contend that it had the right to assert the same claim first to a court (under state law) and then to a jury (under § 1983).

Both actions have as their focus the payment of just compensation.

Respondents' entire basis for rejecting the analogy between condemnation and inverse condemnation actions rests on the supposed distinction that condemnation actions involve compliance with the Takings Clause and inverse condemnation actions involve defiance of the Takings Clause. Based on this distinction, Respondents argue that the proper analogy for Seventh Amendment purposes is between inverse condemnation actions and other "constitutional torts" cognizable under § 1983. Essentially, Respondents assert that whenever a complaint contains a § 1983 claim and has a dollar sign in the prayer, the claimant is entitled to a jury trial.

Respondents' analysis operates at a level of abstraction that is not supported by Seventh Amendment jurisprudence. Respondents argue that the *general character* of § 1983 actions for damages implies a right to jury trial under the Seventh Amendment. This categorical approach to Seventh Amendment analysis is not only unpersuasive, but also contrary to this Court's clear directives. The Court has consistently held that the determination of whether there is a Seventh Amendment right to jury trial depends on the *nature* of the issues to be tried, not the *character* of the overall action. *See Ross v. Bernhard*, 396 U.S. 531, 538 (1970); *In re U.S. Financial Securities Litigation*, 609 F.2d 411, 422 (9th Cir. 1979). Under these precedents, the supposedly all-encompassing tort-like character of claims brought under § 1983 cannot be the starting point for Seventh Amendment analysis. Rather, the analog must be to the nature of the specific type of claim asserted under § 1983.

Respondents have offered no appropriate analog to inverse condemnation actions, and in fact have acknowledged, in other sections of their brief, the unmistakable kinship between condemnation and inverse condemnation actions. Resp. Br. at 39 (acknowledging the " 'practical equivalence in this setting of negative regulation and appropriation.' ") (quoting *Lucas*, 505 U.S. at 1019). Respondents cannot have it both ways. They cannot equate regulatory and

direct takings for one purpose, but claim that regulatory takings are completely distinct from direct condemnation for purposes of the Seventh Amendment. *See First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987) ("The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners [does] not change the essential nature of the claim.").

2. Respondents' Attempt to Lump Inverse Condemnation Claims Into a General Category with Other Constitutional Torts Ignores the Unique Character of Such Claims.

Respondents' analysis inappropriately assumes that an inverse condemnation action under § 1983 is just like any other § 1983 action. In fact, there are meaningful differences between the nature of claims and remedies under the Takings Clause, and those arising under other constitutional amendments. Those differences affect the relevant Seventh Amendment analysis and demonstrate further why regulatory takings claims should be treated the same as direct condemnation proceedings and differently from other constitutional claims brought under § 1983.

With every constitutional right, other than inverse condemnation, money that is awarded to a claimant under § 1983 compensates for a government action that is *prohibited* by the Constitution. By contrast, in the context of inverse condemnation, the government action – the "taking" of property – is expressly *permitted* by the Constitution, as long as just compensation is paid. *See Eastern Enterprises*, 118 S.Ct. 2131, 2156 (Kennedy, J., concurring in part and dissenting in part) ("The [Takings] Clause operates as a conditional limitation, permitting the Government to do what it wants so long as it pays the charge."); *First English*, 482 U.S. at 314 (The Takings Clause "does not prohibit the taking of private property, but instead places a condition on the exercise of that power.").

Moreover, unlike other constitutional rights, the Fifth Amendment expressly prescribes the remedy for both direct

and inverse condemnation of property – payment of just compensation. The unique nature of the "just compensation" remedy demonstrates why Respondents' simplistic equation (§ 1983 + $ = "jury trial") is incorrect. Because a taking is not prohibited under the Constitution, there is no "damage" from the government's action in effecting a "taking." There is only a "constitutional obligation to pay just compensation." *Armstrong v. United States*, 364 U.S. 40, 49 (1960); *see also Jacobs v. United States*, 290 U.S. 13, 16 (1933) ("[A] promise [to pay] was implied because of the duty to pay imposed by the [Fifth] Amendment").

Moreover, even ignoring the unique Fifth Amendment origin of the just compensation remedy and employing a traditional Seventh Amendment analysis, the nature of the just compensation remedy does not support a right to jury trial. Not all claims for monetary relief constitute claims for "damages" giving rise to a right to jury trial under the Seventh Amendment. A monetary award can be either legal or equitable in nature. *See Department of Army v. Federal Labor Relations Authority*, 56 F.3d 273, 276 (1995). The legal remedy of money damages provides an injured party with a substitute for consequential loss, while the equitable remedy of specific relief attempts to give the very thing to which the claimant is entitled. *See id.* The concept of "just compensation," by its nature, is more akin to payment of a monetary entitlement in the nature of specific relief than a payment for consequential loss. Federal courts have consistently held that the measure of just compensation is limited to the fair market value of the property interests being taken, and that lost profits, loss of good will and other consequential losses are not recoverable as "just compensation." *See Wisconsin Central Limited v. Public Services Comm'n of Wisconsin*, 95 F.3d 1359 (7th Cir. 1996); *Mitchell v. United States*, 267 U.S. 341, 344-45 (1925); *United States v. 87.30 Acres of Land*, 430 F.2d 1130, 1132 (9th Cir. 1970).

The essentially equitable nature of the just compensation remedy is not, as Respondents argue, changed by the fact that, in the context of inverse condemnation, the claim is for wrongful withholding of the entitlement to just compensation.

To the contrary, in other contexts, courts have refused to characterize payments of entitlements as "damages" simply because they are wrongfully withheld. *See, e.g., Bowen v. Massachusetts*, 487 U.S. 879, 910 (1988) (order compelling Secretary of Health and Human Services to "undo [its] refusal to reimburse the State" was "specific relief" and not money damages); *see also Borst v. Chevron Corp.*, 36 F.3d 1308, 1324 (5th Cir. 1994); *Zellous v. Broadhead Assoc.*, 906 F.2d 94, 97 (3d Cir. 1990).

C. Respondents Ignored the Fact that the Issues Raised in Inverse Condemnation Are Not of a Type Traditionally Resolved By Juries.

Respondents do not deny that, even in cases that are subject to Seventh Amendment requirements generally, courts may be the appropriate decisionmaker for some issues. *See Markman*, 517 U.S. at 378 (1996); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 136 (1988). Nevertheless, Respondents assert that juries must resolve all inverse condemnation liability issues when regulatory taking claims are asserted under § 1983.

Respondents' argument is premised on the assumption that regulatory takings liability is a simple factual inquiry into the reasonableness of the government action. This premise is incorrect. Inverse condemnation claims have "proven difficult to explain in theory and to implement in practice. Cases attempting to decide when a regulation becomes a taking are among the most litigated and perplexing in current law." *Eastern Enterprises*, 118 S.Ct. at 2155 (Kennedy, J., concurring in part and dissenting in part). Determining inverse condemnation liability requires review of the local government's decision and evaluation of the factors that contributed to the relevant policy determinations.[11] Under well-established standards for reviewing such decisionmaking, the City Council's factual and policy

[11] Courts have repeatedly acknowledged and affirmed this truism. *See, e.g., Recupero v. New England Telephone & Telegraph Co.*, 118 F.3d 820 (1st Cir. 1997) ("Compared with judges, jurors typically have less

determinations are to be given substantial deference. *See* II Davis & Pierce, *Administrative Law Treatise* § 11.2, at 174; *see also Valley Citizens for a Safe Environment v. Aldridge*, 886 F.2d 458, 469 (1st Cir. 1989) (Breyer, J.). Conducting deferential review of factual and policy determinations is an inherently legal task. Juries find facts; they do not review factual findings.

Respondents incorrectly assert that, with the exception of *New Port Largo, Inc. v. Monroe County*, 95 F.3d 1084 (11th Cir. 1996), the City and amici could not "point to a single case decided in § 1983's 127-year history that denied plaintiff the right to a jury trial." Resp. Br. at 17. This assertion ignores numerous cases cited by the City and others in which courts have found that a jury would not be appropriate to determine liability issues in § 1983 actions involving local land use regulation. *See, e.g., Pearson v. City of Grand Blanc*, 961 F.2d at 1211, 1222 (6th Cir. 1992) ("[W]e hold that the application of this deferential standard of review is a matter of law for the court. Otherwise federal juries would sit as local boards of zoning appeals."). Respondents in effect admit that there are exceptions to this general rule by conceding in their brief that their own § 1983 substantive due process claim was tried to the court, but nowhere suggesting that it was improper for the court to decide that claim. Indeed, they cannot because the weight of authority is decidedly against them. *See Midnight Sessions, Ltd. v. City of Philadelphia*, 945 F.2d 667, 682 (3rd Cir. 1991).

To deflect attention from these concerns about jury competence, Respondents extol the virtues of the jury process and assert that citizens who comprise juries are fully capable of deciding policy issues. Respondents miss the point. Certainly, individual jurors can be expected to have their own views on matters of policy. However, the six people sitting on a federal

experience and training relevant to competence to review decisions of others with an appropriate degree of deference while at the same time assuring no misunderstanding or misapplication of governing law.").

jury are not the duly elected policy makers of the local government.[12] The Seventh Amendment does not contemplate allowing these six citizens to review policy determinations.[13]

Respondents also assert that juries are frequently called upon to "judge the reasonableness" of local government policy decisions. Resp. Br. at 14-15. It is wrong to suggest that juries could or should usurp governmental functions in this way, and none of the cases cited by Respondents so hold. At best, in those cases that were otherwise subject to the Seventh Amendment, juries are allowed to resolve factual issues and impose liability for constitutional transgressions that may result from governmental policy.[14] They do not act as super

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[12] Respondents also miss the mark in arguing that jurors buffer the "unwholesome closeness" that is presumed to exist between local government officials and local judges. Resp. Br. at 14 n.13. Whatever "unwholesome closeness" may be presumed to exist between local officials and state judges cannot be imputed to federal judges.

[13] Respondents point to the initiative or referendum process as evidence that citizens are institutionally competent to second guess policy decisions of elected officials. However, in these contexts, it is the entire electorate that decides the policy issue. That there exists a means for voters to review political decisions says nothing about the propriety of allowing a six-person jury to make those decisions. In voting for legislation, citizens are exercising political decisionmaking power. In reviewing governmental actions as federal jurors, citizens are trenching on political decisionmaking power exercised by their elected representatives. *See Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985) ("Federalism and comity demand a reluctance by federal courts 'to trench on the prerogatives of state and local . . . institutions.' ").

[14] For example, Respondents cite *Roma Constr. Co. v. Russo*, 96 F.3d 566 (1st Cir. 1996) for the proposition that juries assess the reasonableness of a broad range of municipal "policies." That case considered a Rule 12(b)(6) dismissal of a § 1983 claim alleging that town officials extorted money from a construction company. "Policy" was only raised in the other context of determining whether the extortion plan could be imputed to the town. Indeed, it should be noted that *Roma Construction*, and many of the other cases cited by Respondents in footnote 15 of their brief, were never submitted to a jury. *See, e.g., Berkeley v. Common Council*, 63 F.3d 295 (4th Cir. 1995) (*en banc*) (reviewing Rule 12(b)(6) dismissal); *Turner v.*

legislators dispensing liability whenever they find government policies to be unreasonable. Given the complexity of the necessary policy determinations, the separation of powers and federalism concerns raised, and the delicate balance that must be struck, courts are the proper decisionmakers for determining whether governmental regulations or decisions constitute regulatory takings.

IV. RESPONDENTS' DEFENSE OF THE NINTH CIRCUIT'S REASONABLENESS STANDARD OF REVIEW MISSES THE POINT.

In defending the Ninth Circuit's *de novo* reasonableness standard, Respondents contend that the City is advocating that local land use decisionmaking be exempt entirely from judicial review. In particular, Respondents suggest that deferential review of local land use decisions would somehow mean that there could be no liability for a regulatory taking under any circumstances. Resp. Br. at 41. This argument is nothing but a straw man. The City has never contended that its actions should be immune from judicial scrutiny under the Takings Clause, and it is absurd for Respondents to characterize the City's arguments in this fashion. What the City contests is the propriety of allowing juries to impose inverse condemnation liability based upon *de novo* reassessments of conflicting facts and policy judgments.

To support their straw man argument, Respondents cite *Nectow v. City of Cambridge*, 277 U.S. 183 (1928), for the proposition that "specific applications of zoning power have always been subject to judicial review." Resp. Br. at 34. The City has never contested either this proposition or the deferential standard of review articulated in *Nectow*. 277 U.S. at 187.

Respondents also assert that *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), somehow altered the

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Upton County, 915 F.2d 133 (5th Cir. 1990) (same). Accordingly, these cases cannot be relied on to support the proposition that juries are frequently called on to resolve policy issues.

deference historically accorded to local land use decision-makers. However, *Lucas* did not involve judicial review of the government's determination that the challenged regulation related to a beneficial purpose. That was conceded by all parties in *Lucas*. The issue in *Lucas* was whether and under what circumstances takings liability could be avoided if a challenged regulation was well intended, but deprived property of all use. The Court's comments relating to the "public nuisance" showing required to avoid liability in these circumstances did not relate at all to whether the government's liability for regulatory takings could be tested under a *de novo* reasonableness standard in the first instance.

Standards of takings liability should provide "some necessary predictability for governmental entities." *Eastern Enterprises*, 118 S.Ct. at 2155 (Kennedy, J., concurring in part and dissenting in part). The record in this case illustrates clearly how and why the *de novo* reasonableness standard applied by the Ninth Circuit and advocated by Respondents would make such predictability totally impossible.

In considering Respondents' development proposal, the City Council was faced with conflicting information. Respondents' consultant testified that the Smith Blue Butterfly ("SBB") had not been spotted on the subject property until 1984. Resp. Br. at 3. On the other hand, the biological opinion issued by the USFWS had concluded that "even moderately consiencious (sic) search surveys" would have resulted in earlier sightings of the SBB on the subject property. Jt. App. 74. Respondents presented evidence that the subject property was of limited environmental significance with limited potential. Resp. Br. at 2. However, USFWS and others advised that the subject property had great environmental significance, that the SBB habitat on the property was increasing and that the property would soon become an "active pathway" for genetic interchange for the SBB. Jt. App. 66-86, 202-05. Respondents' consultant opined that his restoration plan was adequate. Representatives from USFWS, the California Department of Fish and Game and others concluded that it was inadequate. Without question, there was a substantial factual basis for the City's determination that denial of the

proposed project and its restoration plan would further legitimate environmental concerns.[15]

Respondents in effect urge that the City's liability depend not on the existence of such a factual basis for the City's decision, but on the credibility of conflicting witnesses. Under this standard, the predictability of governmental liability will be a function of how accurately the local government can predict how a jury will assess issues of credibility, policy and reasonableness. The result would be uncertainty for public entities and potential liability in virtually every case.

V. RESPONDENTS' DEFENSE OF THE ROUGH PROPORTIONALITY STANDARD IGNORES THE LEGAL AND PRACTICAL DIFFERENCES BETWEEN EXACTIONS AND REGULATORY DENIALS.

Central to the Ninth Circuit's analysis was the application of the rough proportionality concept in evaluating the City's denial of Respondents' condominium project. Yet, Respondents pay scant attention to this issue. Respondents do not respond to the practical and conceptual difficulties involved in applying that standard in a regulatory denial context. Instead, Respondents merely argue that the Ninth Circuit's reference to that standard was gratuitous and, in any event, "rough proportionality" is an appropriate standard to measure the legality of governmental action. Resp. Br. at 42-45.

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[15] Certainly, the City cannot be faulted for preferring the expert opinion of the USFWS over the opinion of Respondents' hired consultant. The USFWS was not an interested party and it has substantial expertise in assessing the potential success of restoration plans. The City afforded the USFWS no more deference than this Court has repeatedly insisted is due to governmental agencies. *Cf. Federal Power Commission v. Florida Power & Light Co.*, 404 U.S. 453, 467 (1972) (citing agency's technical expertise and experience as one reason why courts defer to administrative agency decisionmaking).

The Ninth Circuit's reliance on a rough proportionality standard was not a mere afterthought, incidental to its decision. On the contrary, in upholding the jury's decision, the Ninth Circuit based its decision squarely on a standard of rough proportionality, and it evaluated the sufficiency of evidence to sustain a jury's decision based upon that standard. Pet. App. 17-18. The Ninth Circuit unequivocally asserted that "[e]ven if the City had a legitimate interest in denying Del Monte's development application, its action must be 'roughly proportional' to furthering that interest." Pet. App. 16. Accordingly, the Ninth Circuit's decision cannot be upheld unless the Ninth Circuit's extension of "rough proportionality" into the regulatory denial context was correct.

On the merits, Respondents assert that the concept of proportionality is found everywhere in takings law.[16] However, Respondents have not identified a single regulatory denial case that has imposed inverse condemnation liability on the basis of a "rough proportionality" standard. This absence of authority is not surprising because the rationale articulated in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), does not apply in regulatory denial cases. Denials do not involve the physical appropriation of property interests that was critical to the *Dolan* analysis.

Contrary to Respondents' assertion, *Lucas* provides no support for Respondents' embrace of this type of proportionality standard. In *Lucas*, the Court rejected the proportionality-based argument that a total taking could be justified if the regulation furthered compelling public interests. Instead, the Court adopted a more categorical approach to reviewing regulations that admittedly deprived property of all economically beneficial use. For those cases, the government

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[16] In the broadest sense, a regulation or land use decision that furthers a legitimate public interest but deprives property of all economically viable use can be said to impose a "disproportionate" burden on that property. However, the normative conclusion that a regulative or land use decision imposes a "disproportionate" burden is a far cry from a balancing test based on a "rough proportionality" standard.

can only avoid paying past compensation if the activity proposed by the property owner would be akin to a public nuisance. The Court identified various factors to be considered in determining whether the proposed use would satisfy this public nuisance test. This test only comes into play *after* a "total taking" has been found. These factors have no applicability in determining *whether* a taking has occurred. Additionally, the public nuisance evaluation contemplated by *Lucas* did not involve a proportional weighing of regulatory benefits against project impacts. In fact, by rejecting the argument that a total taking could be justified by strong regulatory benefits, the *Lucas* court impliedly rejected a proportionality based approach to takings cases in favor of a more categorical approach.

Respondents' own formulation of the "rough proportionality" standard in the context of this case most clearly illustrates its unworkability. According to Respondents, this standard requires the jury to compare "the proposed development with surrounding land uses and [evaluate] such intangibles as 'social value' and 'suitability.' " Resp. Br. at 44. Based upon this analysis, Respondents assert that the jury should impose inverse condemnation liability for a project denial unless it concludes "that the harm caused by the proposed development is disproportionate (*i.e.*, its burden outweighs its utility). . . . " Resp. Br. at 44. Thus, in some undefinable way, juries would be asked to mentally tabulate all of the tangible and intangible burdens resulting from a project and balance those burdens against all of the tangible and intangible benefits resulting from the project, and decide, as a factual matter, whether the burdens outweigh the benefits, presumably giving no deference to the factual and policy determinations of the local governmental decisionmaker. Attempting to strike such a complex balance between such incommensurable and unquantifiable factors would befuddle courts and bewilder juries. *Cf. Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 897 (1988) ("[T]he scale analogy is not really appropriate, since the interests on both sides are incommensurate. It is more like judging

whether a particular line is longer than a particular rock is heavy.") (Scalia, J., concurring)

VI. CONCLUSION

For all of the reasons set forth above, the City respectfully requests that the Ninth Circuit's decision in this matter be reversed.

Respectfully submitted,

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September 1998